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In The

# Supreme Court of the United States

TOYOTA MOTOR MANUFACTURING, KENTUCKY, INC.,

*Petitioner,*

v.

ELLA WILLIAMS,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## BRIEF FOR RESPONDENT

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## STATEMENT OF THE CASE

### FACTUAL BACKGROUND

This case arises out of Ella Williams' second lawsuit against Toyota Motor Manufacturing, Kentucky, Inc. ("Toyota") for violations of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101 *et seq.*, and this case seeks to compel Toyota to continue reasonable accommodations which Ms. Williams won as a result of the first ADA lawsuit.

Ella Williams is 42 years of age and is married with children. (JA 37, DCD 16 p. 6).[1] She is five feet tall. (DCD 17, Depo. p. 24). She reads at the ninth grade level, and her mathematical skills are at the tenth grade level. (JA 38).

Her vocational background is in production work and factory work. (DCD 16, Depo. p. 43).

She was employed by Toyota in 1990 in the paint department. Later, she was transferred to the power train group, an assembly line job where she built car engines

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[1] References to the record are made by abbreviations noting the place where the document may be found and perhaps describing the document in abbreviated form; e.g., deposition is Depo. and memorandum is Memo. The Joint Appendix will be referred to by the letters "JA," materials before the District Court will be identified by the District Court docket number, "DCD," materials before the Sixth Circuit Court of Appeals will be identified by the Circuit Court docket number, "CCD," materials appearing in the appendix to the Petition for Writ of Certiorari shall be referred to as "Pet. App.," and matters appearing in Petitioner's Brief on the Merits will be indicated by "Pet. Brief."

using pneumatic tools. (DCD 103, Memo. p. 2). After working with pneumatic tools, she developed painful symptoms in her hands, wrists, and arms and sought treatment from Toyota's in-house medical provider, Industrial Health Services ("IHS"), where she was diagnosed as suffering from carpal tunnel syndrome. (DCD 103, Memo. p. 3). She treated with Dr. James Kleinert of Louisville Hand Surgery who, in May, 1992, permanently restricted Ms. Williams' activity as follows:

1. Light work lifting no more than 20 pounds and frequently lifting or carrying of objects weighing up to 10 pounds,

2. No constant repetitive use of both hands and arms and no flexion or extension of the wrists or elbows.[2]

3. No overhead work and keep hands below heart level, and

4. No use of vibratory or pneumatic tools.

(JA 45-46).

Ms. Williams' work-related injury caused her to file a claim against Toyota under the Kentucky Workers' Compensation Act, Ky. Rev. Stat. 342.0011 *et seq.*, which was settled on the basis of 20% occupational impairment. (DCD 103, Memo. p. 4).

[2] Flexion is the act of bending, and extension is movement bringing members of a limb into or toward a straight condition. "Dorland's Illustrated Medical Dictionary," 24th Edition, 1965.



Additionally, in 1993, Ms. Williams filed suit against Toyota under the ADA[3] on the ground that Toyota had not furnished reasonable accommodation in assigning Ms. Williams to work which she could perform. That suit was settled, and as part of the settlement, Ms. Williams returned to work at Toyota in December, 1993. (DCD 103, Memo. p. 4).

When she returned, Ms. Williams was placed in the body paint inspection group. (DCD 43, Depo. p. 17). Persons with disabilities or medical restrictions were in this group. (DCD 17, Depo. pp. 34-35). Ms. Williams was a medical placement in the group. She was characterized as such on a tracking list which Toyota maintained for the following reason:

> Well, inspection had a history of receiving people that for one reason or another could not use either their hands or wrists or shoulders and things of that nature, and it got to be a problem because we was losing so many people. So we started tracking people for their effectiveness, was this a medically placed team member or not.

(DCD 151, Hall Depo. pp. 8-9).

In Ms. Williams' new group at Toyota, there were four jobs which were as follows:

1. Assembly paint inspection,
2. Paint second inspection,
3. Shell body audit, and
4. E.D. surface repair.

(DCD 17, Depo. p. 19).

[3] Future references to Title I of the ADA will be made by only stating the Section number.

Ms. Williams was placed on a team in the paint shop which only did assembly paint inspection and paint second inspection. (DCD 35, Depo. 23). The assembly paint inspection job was primarily a visual job in which she checked paint for scratches, dents, chips, etc. There was some physical contact with the car. (JA, pp. 24-25). The paint second inspection job involved visually inspecting the paint of the car. She did wear white gloves and would touch the surface of the vehicle if she believed there was an abnormality in the paint finish. (JA pp. 21-22).

Toyota physician David Price described Ms. Williams' jobs as follows:

> The inspection jobs in this plant are the easiest jobs that we give anyone, they require the least physical activity and are basically jobs that are not repetitive in nature. They involve maybe using an observation to look at something or maybe running your hand over a surface to feel for a defect. But they're not a constant or repetitive type of job requirement.

(DCD 24, Depo. p. 47).

The other two jobs in her group, shell body audit and E.D. surface repair, were in the body shop. (DCD 151, Depo. p. 11). Ms. Williams was placed in the team doing the paint shop jobs, assembly paint and paint second inspection, because they were the easier jobs. (DCD 151, Depo. pp. 11-13).

The two other jobs out of the body shop were repetitive manual activity jobs. Toyota assistant manager Kendall Hall stated,



Q. OK. On the team that was doing the two jobs which were shell body and E.D. out of the body shop, did either of those jobs require repetitive movements of the upper extremities?

A. Yes sir.

Q. And which job was that?

A. Well, the shell body job did a lot of hand motions, and you actually wiped the vehicle down with some type of a highlight oil.

Q. OK.

A. I don't know the name of the oil.

Q. What about E.D., was that a job that required repetitive use of the upper extremities?

A. Yes, sir, you actually did some rubbing on the car, some minor repairs, if you got good at it, and you did a lot with the luggage, around the edge of the luggage, things of that nature. So both jobs were repetitive.

Q. Were the jobs over in the body shop more demanding in terms of repetitive activity than the jobs in the paint shop?

A. The paint shop – the paint team was the easier team.

Q. OK, and was that because of repetitive movement of the upper extremities or because of something else?

A. That it was a factor.

(DCD 151, Hall Depo. pp. 12-13).

Upon her return in 1993, Ms. Williams was able to perform her work to the level of an average team member. (DCD 151, Depo. p. 13).

In the fall of 1996, after she had been successfully employed at Toyota for almost three years, Ms. Williams was asked if she would cross-train on the shell body audit job,[4] and she agreed to do so. (DCD 103, Memo, p. 5). Shell body is an inspection for defects in the metal auto body of the automobile. (DCD 35, Depo. pp. 28-30). Ms. Williams was required to soak a sponge in the highlight oil and wipe down part of the shell body of a car. (DCD 16, Depo. p. 8). A part of 450 to 500 car shell bodies had to be wiped down, and the allotted job time was about 58 seconds for each shell body. (DCD 46, Depo. pp. 21-23; DCD 44, Depo. pp. 60-61). The shell body job was more physically demanding than the paint jobs she had been performing, and it caused her to experience pain. (DCD 16, Depo. pp. 9-12). She sought care from Toyota's doctors at IHS, and they diagnosed her as suffering from the following:

1. Myotendonitis bilateral periscapular, an inflamation of the muscles and tendons around both of her shoulder blades,

2. Myotendonitis,

3. Myositis bilateral forearms with nerve compression causing media nerve irritation, and

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[4] Toyota mistakenly identifies the job which Ms. Williams could not do as the E.D. surface repair job, Pet. Brief p. 5, when in fact it was the shell body job. Ms. Williams never attempted to perform the E.D. surface repair job.



4. Thoracic outlet compression which is a condition causing pain in the nerves leading to the upper extremities.

(DCD 103, Memo. p. 6).

She was seen by Toyota's IHS doctor David Price who diagnosed her as suffering from pan myositis which is a general irritation of the trapezius, biceps, and triceps muscles. (DCD 24, Depo. pp. 9-10). He stated her neck, shoulder, and upper extremity discomfort was related to her employment. (DCD 24, Depo. p. 67). He noted her permanent restrictions from Dr. Kleinert and added restrictions to those. The additional restrictions were, "no above chest level, extended reach, or repetitive rotary or lateral movements of the head/neck." (JA 45-46).

Ms. Williams also sought care from Dr. Mark Smith, a board-certified orthopedic surgeon, who diagnosed Ms. Williams as suffering from myofacial pain caused by her work. He restricted her activity and testified she should not be wiping highlight oil on from 450 to 500 auto shell bodies per shift because this would significantly aggravate her condition. There were objective signs of injury which were knotting and spasms of the muscles which he treated by trigger point injections. There was also an MRI showing peritendinitis of the muscles surrounding the shoulder joint. (DCD 103, Memo. pp 9-10, Ex. E).

After Ms. Williams experienced difficulties with the shell body job, a Toyota representative viewed the job in connection with Ms. Williams' medical restrictions and concluded that her restrictions should not preclude her from doing the job, "Because under the Department of Labor standards constant repetitive is greater than 67% of

the work and you do not use your arms in greater than 67% of the work in that shell body process." (DCD 45, Mills Depo. p. 116). The job was not analyzed while Ms. Williams was doing the job. (DCD 45, Mills Depo. p. 45). Therefore, the Toyota representative could not have understood that the hood of the shell body was above Ms. Williams' chest level and the top of the car came to her above eye level which would require her to work on the hood and the deck at or above shoulder level. (DCD 16, Depo. pp. 13-15). This is a violation of the restrictions prohibiting work above heart level. The Toyota representative also did not understand that the medical application of the restrictions, especially the word *constant*, requires a common sense interpretation and not a technical definition such as 66% of the time. Toyota doctor David Price testified the restrictions have to be written in everyday language and using common sense, so that the non-medical people that have to interpret them will be able to do so. He also testified the ultimate question is whether a team member can perform a job within the restrictions. (DCD 24, Depo. pp. 22-23).

William J. Weikel, Ph.D., diplomate, American Board of Vocational Experts, gave testimony that the permanent restrictions from Dr. Kleinert caused Ms. Williams to suffer a lack of access to the labor market of from 50% to 55% and that she could return to the paint inspection job at Toyota, as she did from December, 1993 to October, 1996, if the job were still available to her. (JA 41). Dr. Weikel's evidence is directed to the economy of central Kentucky where Ms. Williams lives. (DCD 157, Depo. pp. 39-40). He states if she cannot return to her customary



work at Toyota, "I would expect a significant loss of wages throughout her lifetime." (JA 41).

In addition to the vocational ramifications of her injury and consequent medical restrictions, all Ms. Williams' life activity is affected. She needs occasional help with dressing because "I can't reach my arms like I need to anymore." Gardening is limited, housework is limited, and driving an automobile is curtailed. When she left Toyota in December, 1996, for a period of months, "Everything hurts. And if I do anything at all, it causes – my neck locks up. Sitting for a long period of time and not moving and stirring, it hurts." (JA 38-41).

The evidence is uncontradicted concerning Ms. Williams' medical diagnoses and medical restrictions as is the expert vocational testimony from Dr. Weikel.

Ms. Williams could not do the shell body job. (DCD 17, Depo. p. 97). Toyota informed Ms. Williams that she would have to do the shell body job or be fired. Ms. Williams attempted to comply with the demand, and in doing so she was injured further and could not continue working. When Ms. Williams could not work, Toyota fired her under the guise that she had voluntarily resigned her employment by not coming to work. (DCD 103, Memo. p. 12).

## JUDICIAL PROCEEDINGS BELOW

On April 18, 1997, Ms. Williams brought suit against Toyota in the United States District Court for the Eastern

District of Kentucky alleging that she is a qualified individual with a disability and that Toyota has discriminated against her by failing to reasonably accommodate her disability. A trial by jury was demanded. (DCD 1).

After discovery, the case was submitted to the District Court on cross-motions for summary judgment (DCD 103, 99), and the Court overruled Ms. Williams' motion for summary judgment and granted Toyota's motion for summary judgment (DCD 158, Memorandum and Order).

The District Court ruling is muddled because the District Court did not understand the movant for summary judgment has the initial burden to demonstrate why a summary judgment is in order. Instead, the District Court believed that when a motion for summary judgment is made, the non-movant is required to prove a prima facie case without regard to whether the movant claimed that an essential element of the non-movant's case was lacking. "Accordingly, in order to withstand Defendant's motion for summary judgment, Plaintiff must utilize the *McDonnell Douglas*[5] framework, and is charged with the task of coming forth with her prima facie case." (Pet. App. 30a). This led to criticisms by the District Court that Ms. Williams failed to present any evidence regarding the nature and severity of her impairment, the duration of it or the long-term impact which are considerations mentioned in 29 C.F.R. § 1630.2(j)(2). (Pet. App. 36a). Toyota never urged this as a ground for granting summary judgment and could not have in light of Dr. Kleinert's restrictions which were permanent, as

[5] 411 U.S. 792 (1973)



well as the medical testimony and diagnoses of Toyota's physicians and others. Likewise, the District Court strongly criticized Ms. Williams because in connection with the activity of working, she did not identify her access to the job market *"in her own geographical area."* (Pet. App. 40a, emphasis in original). Again, Toyota never raised this point because it was aware that Dr. Weikel had directed his testimony to the job market in Ms. Williams' geographical area. (DCD 157, Depo. pp. 39-40).

However, the District Court did state other reasons why Ms. Williams could not be disabled in the major life activities of performing manual tasks and working. As concerns manual tasks, the District Court stated that Ms. Williams' references to manual limitations "are irretrievably contradicted by Plaintiff's continual insistence that she could perform the tasks in assembly and paint inspection without difficulty; positions requiring manual tasks." (Pet. App. 36a). The lack of logic in this statement is apparent. The fact that Ms. Williams can do isolated, non-repetitive manual activity does not allow the inference that she has no substantial limitations regarding repetitive manual activity that the average person in the population can perform.

As concerns the major life activity of working,[6] the District Court relied heavily on the Sixth Circuit case of *McKay v. Toyota Motor Mfg. U.S.A., Inc.*, 110 F.3d 369 (6th Cir. 1997) in which it was held that an individual with restrictions similar to those of Ms. Williams was not ADA

[6] The District Court also ruled Ms. Williams was not disabled in the major life activity of lifting because it was felt her limitations were not substantial enough. (Pet. App. 37a).

disabled because the restrictions only related to a narrow range of assembly line manufacturing jobs.

The District Court also believed that since Ms. Williams had not done medium duty work previously, she could not be a qualified individual with a disability as concerns medium work. (Pet. App. 42a). In fact, Dr. Weikel considered Ms. Williams to be capable of doing medium level work prior to injury because he knows of nothing to prevent her from doing that. (DCD 157, Depo. pp. 19-21). There is no evidence suggesting she could not do medium work prior to her injury.

Ms. Williams also contended before the District Court that she was ADA disabled because under § 12102(2)(B), she has a record of an impairment that substantially limits a major life activity and under § 12102(2)(C), she is regarded as an individual having an impairment that substantially limits a major life activity. The District Court rejected these contentions. (Pet. App. 43a-47a).

On appeal to the Sixth Circuit, Ms. Williams argued the District Court erred in granting summary judgment to Toyota on the issue of whether Ms. Williams was substantially limited in the major life activity of performing manual tasks. She argued the District Court erred in finding no substantial limitation concerning manual tasks only because Ms. Williams could perform the easy jobs of assembly paint and paint second inspection which involved little manual activity. (CCD, 6/16/99, Brief, p. 20).

The Sixth Circuit agreed. The panel noted the ADA prohibits discrimination against "a qualified individual with a disability" and especially noted, "The phrase



'qualified individual with a disability' is defined as a person 'with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.' § 12111(8)." (Pet. App. 3a).

Further, the panel specifically noted and emphasized that in order to constitute an ADA disability because of a physical or mental impairment, the impairment must be one which *"substantially limits one or more of the major life activities."* (Pet. App. 3a, emphasis in original).

Ms. Williams' impairments were regarded as substantial when the panel said, "Her ailments are analogous to having missing, damaged or deformed limbs . . . ", but the panel then linked this statement to various manual jobs "that required the gripping of tools and repetitive work with hands and arms extended at or above shoulder level for extended periods of time." (Pet. App. 4a).

Ms. Williams does not believe the foregoing language was intended to mean she was only disabled as concerns jobs requiring gripping of tools and repetitive work at or above shoulder level. The panel makes this clear when it later says, "Here, the impairments of limbs are sufficiently severe to be like deformed limbs and such activities affect manual tasks associated with working, as well as manual tasks associated with recreation, household chores and living generally." (Pet. App. 6a).

Having already correctly stated that an ADA disability requires a substantial limitation of a major life activity, the panel then goes on to add another requirement to the analysis of an ADA disability, and that additional

requirement is, "[T]he plaintiff must show that her manual disability involves a 'class' of manual activities affecting the ability to perform tasks at work." (Pet. App. 4a).

This additional requirement that in order to prove an ADA disability it is necessary not only to prove a substantial limitation in a major life activity, but it is also required that the substantially limited major life activity affect the ability to perform tasks at work is a subject neither briefed nor argued by the parties before the Sixth Circuit.

Ms. Williams will not support or argue for a definition of disability which requires not only that the claimant must be substantially limited in a major life activity, but additionally, that the substantial limitation must also affect the ability to work.[7]

However, regardless of whether the Sixth Circuit enunciated the correct analysis to determine whether an ADA disability exists, it is incorrect to maintain the Sixth Circuit has held an ADA disability exists without a showing that the impairment substantially limits a major life activity and exists only because the impairment incidentally "affects" work.

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[7] In Respondent's Brief in Opposition to the Petition, p. 9, it is suggested that the panel's requirement that the impairment "affect" employment was simply an acknowledgment that § 12112(a) prohibits discrimination in employment. However, with the rendition of *Kiphart v. Saturn Corp.*, 251 F.3d 573 (6th Cir. 2001), Respondent understands that the "affect" work requirement is part of Sixth Circuit precedent applying the requirement to the determination of whether a disability exists. Respondent does not support this interpretation.



Toyota mistakenly says the Sixth Circuit held as a matter of law that "Williams' inability to perform the particular manual tasks associated with her specific job, without more, demonstrates that she is 'substantially limit[ed]' in the major life activity of performing manual tasks." (Pet. Brief, pp. 11-12 with similar assertions at Pet. Brief, pp. 1, 10, 15, 18-19 n. 6).

Although the opinion below may lack clarity in some respects, there is no finding of disability simply because Ms. Williams was only unable to perform the shell body audit job.

Toyota has misstated the holding of the Sixth Circuit in another respect.

Toyota asserts, "According to the panel, it was irrelevant that Williams remained perfectly capable of accomplishing any number of manual tasks outside the narrow subset of assembly-line duties that gave her difficulty." (Pet. Brief p. 8, citing to Pet. App. 4a).

This is incorrect. The correct statement of the panel is, "The fact that Williams can perform a range of isolated, non-repetitive manual tasks performed over a short period of time, such as tending to her personal hygiene or carrying out personal or household chores, does not [a]ffect a determination that her impairment substantially limits her ability to perform the range of manual tasks associated with an assembly line job." (Pet. App. 4a).

The Sixth Circuit opinion has a dissent by Judge Boggs who would affirm the District Court. He says,

> Williams has not shown a substantial limitation in working, because the inability to perform a

> single, particular job is not a substantial limitation, and she has not demonstrated that there is a broader class of jobs from which her impairment disqualifies her. Nor has Williams shown a substantial limitation in performing manual tasks, because her limitation is mostly confined to a subset of job-specific tasks.

(Pet. App. 11a).

There is no support in this record for Judge Boggs' conclusion. No one testifies Ms. Williams' restrictions only prevent her from performing the shell body job. Rather, the evidence is that she is unable to perform any job requiring repetitive manual activity or the lifting of more than 10 pounds on a regular basis. No witness suggests that performing repetitive manual labor is "a single, particular job." The assertion that Williams has not demonstrated disqualification from a broader class of jobs is incorrect and is conclusively contradicted by Dr. Weikel who states Ms. Williams has lost access of from 50% to 55% of the labor market. (JA 41). Likewise, the assertion that Ms. Williams' limitation "is mostly confined to a subset of job-specific tasks," is without factual support and ignores the broad range and class of work which is beyond her capability as well as the pervasive effect her limitations have in her everyday life.

The likely basis for Judge Boggs' statements is the case of *McKay v. Toyota Motor, Mfg., U.S.A., Inc.*, 110 F.3d 369 (6th Cir. 1997) which erroneously holds that as concerns the major life activity of working, an inability to perform repetitive manual activity coupled with an inability to lift more than 10 pounds on a frequent basis



only disqualifies an individual from performing "[A] narrow range of assembly line manufacturing jobs." *Id.* at 373.

It is true Ms. Williams cannot perform the shell body job. Her limitations also prevent her from performing many jobs. There are approximately 16,000,000 manufacturing jobs in the nation, and approximately 290,000 of these jobs are in Kentucky.[8] A 50% loss of access would translate into a loss of 8,000,000 manufacturing jobs nationwide, and a loss of 145,000 jobs in Kentucky.

Having reached the conclusion that Ms. Williams was ADA disabled as concerns the major life activity of performing manual tasks, the Sixth Circuit declined to address whether she was substantially limited as to the major life activities of lifting or working (Pet. App. 5a), and it also declined to address whether Ms. Williams made a sufficient showing to be entitled to trial on the issues of whether she was disabled because she had a record of being disabled, § 12102(2)(B), or that she was disabled because she was regarded as having a disabling impairment, § 12102(2)(C). (Pet. App. 6a).

Toyota, being dissatisfied with the Sixth Circuit opinion, filed a Petition for Rehearing En Banc, and Ms. Williams filed a Petition for Rehearing. Toyota's Petition questioned the disability analysis. (CCD, 7/21/00). Ms. Williams' Petition requested the panel to rule on her

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[8] U.S. Census Bureau, County Business Patterns 1999, United States at p. 23 and Kentucky at p. 10, Washington, D.C. 2000, http://www.census.gov/prod/www/abs/cbptotal.html

claims that the District Court erroneously granted summary judgment on her alternate theories of disability. (CCD, 7/24/00).

The panel issued an Amended Opinion. (Pet. App. 1a-11a). There were significant changes.

The original opinion stated, "Although we have concluded that there is a triable issue of fact as to whether Williams was disabled and as to whether the defendant auto manufacturer failed to reasonably accommodate her disability,. . . . " (Pet. App. 17a). The amended opinion stated, "Although we have concluded that Williams is disabled and that there is a triable issue of fact as to whether the defendant auto manufacturer failed to reasonably accommodate her disability,. . . . " (Pet. App. 6a).

The original opinion stated, "Because we conclude that a trial on the merits is necessary on Williams's ADA claim, . . . " (Pet. App. 16a). The amended opinion stated, "Because we conclude that Williams is substantially limited in performing manual tasks, we do not need. . . . " (Pet. App. 5a).

The Court then remanded the case only on the issue of whether Toyota reasonably accommodated the disability. In other words, the Sixth Circuit held as a matter of law that Ms. Williams was ADA disabled.

## SUMMARY OF THE ARGUMENT

The Question Presented masks the issues present in this case because it is settled law that the inability to perform one type of job, a specialized job, or a particular



job of choice is not a substantial limitation in the major life activity of working. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 492 (1999). As concerns working, disability exists only when the individual is significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes. 29 C.F.R. § 1630.2(j)(3)(i).

The Question Presented is premised on several propositions which are disputed and which are as follows.

Toyota asserts that because Ms. Williams can perform many manual tasks, both at home and work, it is error to find a manual disability. (Pet. Brief, p. 3). Toyota says a manual impairment must impose "severe restrictions" and "impose a *considerable* restriction on" using "one's hands to meet the basic demands of life" before the manual impairment could rise to the level of an ADA disability (Pet. Brief, p. 13, emphasis in original). Even though the Sixth Circuit expressly declined to consider whether Ms. Williams was disabled as concerns working, (Pet. App. 5a), Toyota says the Sixth Circuit violated the rule, heretofore only applied to working, that an inability to do a particular job prevents the finding of a manual disability. (Pet. Brief, p. 19). Finally, Toyota warns that unless its propositions and arguments are accepted, beneficent Congressional intentions to aid the disabled will be thwarted because a "vast number" of employees with minor impairments will seek costly and unreasonable accommodations. This will so strap the financial resources of employers that they will be unable to accommodate the needs of the "truly disabled." (Pet. Brief, pp. 29-30).

Toyota arguments are without factual support, violate traditional rules of statutory construction; and rest upon a disability analysis which has been expressly rejected.

When the Question Presented rests upon assumed facts and premises, it is appropriate to address those facts and premises even if they are not explicit in the question. *Bragdon v. Abbott*, 524 U.S. 624, 648 (1998).

I.

Ms. Williams is disabled because she is substantially limited in the major life activity of performing manual tasks. There is no issue of fact concerning her medical restrictions on repetitive manual activity and being limited to lifting no more than ten pounds regularly and no more than twenty pounds occasionally. Her impairment affects, "[M]anual tasks associated with recreation, household chores, and living generally." (Pet. App. 6a). The absence of a factual dispute entitles her to judgment as a matter of law.

II.

Toyota's tunnel vision concentration on the meaning of disability does damage to the central purpose of the Act which is to prohibit discrimination against qualified individuals with a disability; that is, people who are able to work. The meaning of *disability* can only be determined by viewing it in the context of the Act as a whole. To adopt Toyota's harsh view of *disability* is to limit the application of the ADA to only a few because many of those who meet Toyota's disability definition will not be



entitled to protection because they will be so impaired they cannot work. The ADA only protects those able to work.

Limiting the application of the Act by employing a "rigorous threshold" (Pet. Brief, p. 10) to being ADA disabled frustrates the remedial purpose of the Act by increasing the standard to where the individual would be so disabled, he could not work. Although the purpose of keeping the disabled at work is properly limited by the rule that reasonable accommodation not be an "undue hardship," the facts are that accommodation could be had without any cost in the instant case by allowing the same accommodations previously allowed, and that accommodation in general is inexpensive.

The concept that Ms. Williams is not manually disabled because she is capable of performing many manual tasks at home and at work is irrelevant. Cases decided under the Rehabilitation Act of 1973, 29 U.S.C. §§ 701, *et seq.*, which are authoritative here, hold that to be eligible for relief, the person must be "otherwise qualified," meaning the disabled individual may possess many abilities that qualify him for various activities, including work.

III.

Alternatively, the record gives rise to genuine issues of material fact concerning whether Ms. Williams is disabled. Repetitive factory work is not a narrow range of jobs too small to warrant ADA protection. A jury trial is required on all issues. Ms. Williams does not abandon her claim that she is disabled as concerns working or lifting,

nor does she abandon her claims that she is disabled because she has a record of being disabled and is regarded as being disabled.

## ARGUMENT

### I.

### THE SIXTH CIRCUIT CORRECTLY HELD THAT MS. WILLIAMS WAS DISABLED AS A MATTER OF LAW AS CONCERNS PERFORMING MANUAL TASKS.

The Sixth Circuit properly adjudged Ms. Williams to be disabled as a matter of law even if the language of the opinion is incorrect. "[T]his Court 'reviews judgments, not statements in opinions,'. . . . " *Johnson v. DeGrandy*, 512 U.S. 997, 1003 (1994) (citations omitted).

To establish a *disability* under the ADA, respondent is required to show that she has an "impairment" that "substantially limits one or more of [her] major life activities." § 12102(2)(A).

The method of determining whether an ADA disability exists is stated in *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998).

First, consideration is given to whether Ms. Williams' physical conditions; myotendonitis, etc.; constitute a physical impairment. There is no dispute here because Toyota agrees that her physical conditions constitute ADA impairments. (Pet. Brief, p. 11).

Second, consideration is given to whether Ms. Williams identifies a "major life activity." Ms. Williams identifies the major life activity as performing manual tasks.



Again, there does not appear to be controversy over whether "performing manual tasks" constitutes a "major life activity." The Equal Employment Opportunity Commission regulations implementing Title I of the ADA, which at the very least " '[C]onstitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance,' " *Bragdon*, 524 U.S. at 624 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-140 (1944)) identify performing manual tasks as a major life activity. Additionally, Toyota recognizes that performing manual tasks is a major life activity as per 29 C.F.R. § 1630.2(h)(2)(i). (Pet. Brief, p. 11).

Third, the inquiry becomes, "[W]hether the impairment substantially limited the major life activity." *Bragdon*, 524 U.S. at 631. This inquiry involves consideration of the facts and of applicable regulations.

The facts concerning Ms. Williams' restrictions are not questioned by Toyota. In summary, she cannot lift more than 20 pounds, she cannot lift more than 10 pounds on a regular basis, and she cannot engage in repetitive manual activity.

The regulation, 29 C.F.R. § 1630.2(j)(1-2), states what is necessary in order to be substantially limited. This requirement is met when the employee is "[S]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general society can perform that same major life activity." § 1630.2(j)(1)(ii).

There is no attempt by Toyota to suggest that the "average person in the general population" is unable to lift more than 20 pounds and unable to lift more than 10 pounds on a regular basis. There is no suggestion that the "average person" is unable to engage in repetitive manual activity. The Sixth Circuit aptly stated the nature and severity of Ms. Williams' impairment when it said, "Here, the impairments of limbs are sufficiently severe to be like deformed limbs and such activities affect manual tasks associated with working, as well as manual tasks associated with recreation, household chores and living generally." (Pet. App. 6a).

Additionally, the regulation states three factors to be considered in determining what is a substantial limitation in a major life activity. They are:

"(i) the nature and severity of the impairment;

(ii) the duration or expected duration of the impairment; and

(iii) the permanent or long-term impact, or the expected permanent or long-term impact of or resulting from the impairment."

§ 1630.2(j)(2).

The nature and severity of her impairments are documented by the medical diagnoses.

As for duration of her impairments, the evidence is clear that her restrictions are permanent.

The permanent or long-term impact resulting from her impairment is that she is never going to be able to lift more than 10 pounds on a regular basis. She is never



going to be able to lift more than 20 pounds and will only be able to lift 20 pounds occasionally. She will never be able to engage in repetitive manual activity.

Ms. Williams submits that the Sixth Circuit finding of an ADA disability is appropriate because, "[T]he record taken as a whole could not lead a rational trier of fact to find for" Toyota. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 474 U.S. 574, 587 (1986).

Ms. Williams suggests it is significant that *Bragdon v. Abbott, supra,* is a case where Ms. Abbott was found to be ADA disabled as a matter of law by all three courts which considered the question, and this Court held a 20% risk of transmitting AIDS to a sexual partner along with an 8% risk of transmitting AIDS to a newborn child constitutes " . . . [A] substantial limitation on reproduction." *Bragdon*, 524 U.S. at 639-640.

Likewise, the uncontradicted report or Dr. Weikel, and the published statistical data suggest that Ms. Williams is disqualified from millions of manufacturing jobs as a result of her impaired ability to perform manual tasks.

The Sixth Circuit's judgment that Ms. Williams was ADA disabled is correct and should be affirmed.

## II.

## TOYOTA'S INTERPRETATION OF *DISABILITY* IS OUT OF CONTEXT, DENIES THE REMEDIAL PURPOSE OF THE ACT AND RELIES ON A DISABILITY ANALYSIS PREVIOUSLY REJECTED.

### A.

### THE MEANING OF *DISABILITY* IS DETERMINED BY CONSIDERATION OF THE ACT AS A WHOLE.

Not only must the statutory provisions defining *disability* be considered, but it also is necessary to consider the context in which the term appears in the Act as a whole in order to know what the term means.

The case of *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) states,

> In so concluding we do nothing more, of course, than follow the cardinal rule that a statute is to be read as a whole, see *Massachusetts v. Morash*, 490 U.S. 107, 115, 109 S.Ct. 1668, 1673, 104 L.Ed.2d 98 (1989), since the meaning of statutory language, plain or not, depends on context. See, *e.g. Shell Oil Co. v. Iowa Dept. of Revenue*, 488 U.S. 19, 26, 109 S.Ct. 278, 282, 102 L.Ed.2d 186 (1988). "Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used. . . . " *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (CA2 1941) (L. Hand, J.) (quoted in *Shell Oil, supra*, 488 U.S. at 25, n.6, 109 S.Ct. at 281, n.6).



Statutory terms are to be given their ordinary, contemporary, common meaning unless Congress intended differently. *Williams v. Taylor*, 529 U.S. 420, 431 (2000).

Here *disability* must be construed in context because a simple dictionary definition will not adequately explain the role of *disability* in the ADA. For example, disability can be understood to mean an "inability to do something," or the "inability to pursue an occupation or perform services for wages because of physical or mental impairment."[9]

It is certain that *disability* does not mean *inability* because § 12102(2)(A) states *disability* is an "impairment that substantially limits . . . ," not *prohibits* a major life activity. *Bragdon v. Abbott*, 524 U.S. 624, 641 (1998) states, "The Act addresses substantial limitations on major life activities, not utter inabilities."

Further, § 12102(2) states that disability be determined, "[W]ith respect to an individual . . . ," and this implies that Ms. Williams' limited education and work experience should be taken into account. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483 (1999) says, "[W]hether a person has a disability under the ADA is an individualized inquiry."

It is notable in the instant case that neither Toyota nor its *amici* make any comment upon the role that *disability* plays in the administration of the ADA. Instead, attention is focused upon the meaning of *disability* in isolation to other provisions of the ADA, and a construction of

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[9] Webster's Third New International Dictionary of the English Language Unabridged 642 (1966).

*disability* is urged which only can be termed harsh and draconian.

Toyota urges a "rigorous threshold for coverage" under the ADA and claims the "impairment must be one that imposes severe restrictions." (Pet. Brief, pp. 10, 12). In particular, Toyota claims that in order for one to be substantially disabled in the major life activity of performing manual tasks, there must be *considerable* restriction on being able to use one's hands to meet "the basic demands of life." (Pet. Brief, p. 13).

The goal of such extreme interpretations of *disability* would appear to be candidly stated in the *amicus* brief of American Trucking Associations, Inc., *et al.*, at page 10, where it is stated, "Defining 'disability' properly also is critically important in keeping the lid on ADA litigation."

These extreme interpretations are not justified and should be rejected when the concept of *disability* is considered within the context of the ADA as a whole.

The operative provision of Title I of the ADA, 42 U.S.C. §§ 12111-12117, is § 12112(a) which states,

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

Importantly, the ADA, Title I, does not prohibit discrimination against all disabled individuals. Disability discrimination is prohibited only against "a qualified individual with a disability." Section 12111(a) informs,



> The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

The point of the foregoing recitation is to show that in order for an individual to be entitled to ADA relief, that individual must be able to carry out the essential functions of employment. Put another way, if an individual is so disabled that he cannot work, then he is not entitled to relief under the ADA regardless of the discriminatory practices used against him.

It is beyond cavil that the ADA protects individuals capable of regular employment, but if the term *disability* is interpreted in such a harsh manner so as to allow only those whose restrictions are so severe as to prevent them from working to be considered *disabled*, then the operative provision of the ADA, § 12112(a), is thwarted.

The ever present tension in the ADA is between the concepts of *disability* and of a *qualified individual with a disability*. The seeming paradox of the ADA is that it protects individuals who are *disabled*, but only if they are able to perform the essential functions of the employment; that is, only if they can work.

> An ADA plaintiff bears the burden of proving that she is a "qualified individual with a disability" – that is, a person "who, with or without reasonable accommodation, can perform the essential functions" of her job. 42 U.S.C. § 12111(8).

*Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795 at 806 (1999).

The ADA protects disabled people who can work.

**B.**

**THE MEANING OF *DISABILITY* UNDER THE ADA SHOULD BE CONSTRUED SO AS TO FURTHER AND EFFECTUATE THE REMEDIAL PURPOSE OF THE ACT.**

It is axiomatic that statutes should be construed liberally in order to effectuate their remedial purposes. *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268 at 281 (1980); *Reed v. Steamship Yaka*, 373 U.S. 410 at 415 (1963); *Voris v. Eikel*, 346 U.S. 328 at 333 (1953); and *Baltimore & Philadelphia Steamboat Comp. P.S.B. Co. v. Norton*, 284 U.S. 404 at 414 (1932).

In *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795 at 801 (1999) this Court declares the purpose of the ADA to be as follows:

> The ADA seeks to eliminate unwarranted discrimination against disabled individuals in order both to guarantee those individuals equal opportunity and to provide the Nation with the benefit of their consequently increased productivity.

Ms. Williams suggests the foregoing means the purpose of the ADA is to guarantee equal employment opportunity to disabled individuals who can work. This has the salutary purpose of increasing the employees' economic welfare as well as the economic welfare of the Nation. The ADA prevents employers from taking



adverse job actions against employees who can work, such as Ms. Williams who was working. The mental or physical impairments must substantially limit one or more major life activities, but the limitations cannot be so great as to prevent the employee from performing the "essential functions of the employment position." § 12111(a).

Of course, there are individuals who have catastrophic disabilities but can still work. There can be no question about their disabilities, and no question that the ADA protects and applies to them. Yet, this does not mean that one must be catastrophically disabled in order to be entitled to ADA protection.

It being the purpose of the ADA to keep people at work, and it being the scope of the ADA to protect only those who can work, the ADA should be construed so as to protect those who have substantially limiting impairments which do not prohibit working.

Although it is claimed that such a so-called "relaxed" standard of *disability* will defeat the Act's purpose to help the "truly disabled" individuals because of the high cost of reasonable accommodation, there is absolutely no evidence in this record that would support such a view. Indeed, reasonable accommodation in the instant case would have been totally without cost to Toyota because the reasonable accommodation was simply to allow Ms. Williams to return to the productive job which she had performed for almost three years prior to Toyota's discrimination.

Leaving the instant case aside for a moment, the information which does exist concerning the cost of reasonable accommodation shows that the cost of accommodation is minimal and the cost of not accommodating the disabled is substantial.

In formulating and considering the provisions of the ADA before its passage, Congress received testimony from numerous individuals concerning the cost of reasonable accommodation. Attention was given to the cost of reasonable accommodation under the Federal Rehabilitation Act of 1973 because of the identical statutory provisions concerning reasonable accommodation in the Rehabilitation Act.

Jay Rochlin, Executive Director of the President's Committee on Employment of People with Disabilities, testified that a 1982 study showed that a majority of accommodations provided by the Federal Contractors involved little or no cost. Testimony before the House Subcommittees on Select Education and Employment Opportunities, September 13, 1989, No. 1 101-51, p. 35. According to the President's Committee which operates the Job Accommodation Network, some typical accommodations include:

> A timer with an indicator light which allowed a medical technician who was deaf to perform the laboratory tests required for her job;
>
> A light probe which allowed a receptionist who was visually impaired to determine which lines on the telephone were ringing, on hold, or in use at her company;



> A headset for a phone which allowed an insurance salesperson with cerebal palsy to write while talking.

Witnesses also explained that there will be a need for more expensive accommodations as well, including readers for blind persons, interpreters for deaf persons, and physical accommodations for those with mobility impairments. But even costs for these accommodations are frequently exaggerated. Evan Kemp, Commissioner of the Equal Employment Opportunity Commission, explained to the Committee:

> Sears and Roebuck made their whole national headquarters accessible for $7,600.00 with TTY's, ramps, this and that and the other thing. It is hard to believe that they could do it for that cheap a price. But if a person wants disabled people, the accommodations really don't become a burden. If they don't they always do. (Testimony before House Subcommittees on Capital Select Education and Employment Opportunities, September 13, 1989, No. 101-51, p. 20).

A witness, Justin Dart, Jr. stated:

> As a former CEO of both large and small enterprises, employing persons with severe disabilities and constructing accessible facilities, I know that ADA is affordable for business and that ADA is good business and this is not simply my personal opinion. Every significant requirement of ADA is now being implemented successfully by progressive public and private entities somewhere. (Testimony before House Subcommittees on Capital Select Education and

> Employment Opportunities, Ser. No. 101-37, July 8, 1989, p. 57).

Not only is the cost of accommodation minimal, the societal cost of not reasonably accommodating the disabled is great. Congress specifically has found the continuing existence of unfair discrimination "[C]osts the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity." 42 U.S.C. § 12101(a)(9).

The term *disability* should be construed so as to increase the number of economically productive persons in our society even though they have substantially limiting impairments which do not impair their ability to work. Employers are protected from unreasonable accommodation costs if the accommodation constitutes an "undue hardship." § 12111(10) and § 12112(b)(5)(A).

## C.

## *DISABILITY* SHOULD BE CONSTRUED IN A MANNER CONSONANT WITH THE INTERPRETATION GIVEN TO THE SAME TERM BY THE FEDERAL REHABILITATION ACT OF 1973.

*Disability* is a word with a history. The statutory language defining disability is practically identical with the definition of "handicapped individual" in the Rehabilitation Act of 1973, currently found at 29 U.S.C. § 705(9), and the definition of "handicapped" contained in the Fair Housing Amendments Act of 1988, 42 U.S.C. § 3602(h)(1). *Bragdon v. Abbott, Id.* at U.S. 631.

Moreover, the ADA itself in § 12201(a) provides that nothing in the ADA shall be construed to apply a lesser



standard than the standards applied under the Rehabilitation Act of 1973.—

This Court has found the statutory direction in the ADA, § 12201(a), to mean,

> The directive requires us to construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act.

*Bragdon v. Abbott,* at U.S. 632.

Reference to the Rehabilitation Act of 1973 also is appropriate because when Congress adopted language of the Rehabilitation Act into the ADA, this suggests that Congress intended those provisions to be interpreted in the same way they had been interpreted under the Rehabilitation Act.

> So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.

*Lorillard v. Pons,* 434 U.S. 575, 581 (1978).

An examination of decisions under the Rehabilitation Act is helpful in arriving at a proper construction of *disability* in three ways.

First, even though the question of what constituted a disability under the Rehabilitation Act was not often addressed, the Courts adjudicating Rehabilitation Act claims routinely adopted an expansive view of what

constitutes a disability and found disability to include epilepsy,[10] cardiovascular disease,[11] former drug use,[12] psychiatric problems,[13] legal blindness,[14] manic depressive syndrome,[15] ankylosing spondylitis,[16] nervous and heart conditions,[17] multiple sclerosis,[18] blindness in one eye,[19] heart condition,[20] osteoarthritis of the knee joints,[21] cerebal palsy and dyslexia,[22] leg amputation,[23] unusual sensitivity to tobacco smoke,[24] retinitis pigmentosa,[25]

[10] *Fitzgerald v. Green Valley Area Educ. Agency*, 589 F.Supp. 1130, 1135-36 (S.D. Iowa 1984).

[11] *Bey v. Bolger*, 540 F.Supp. 910, 916 (E.D. Pa. 1982).

[12] *Davis v. Bucher*, 451 F.Supp. 791, 796 (E.D. Pa. 1978).

[13] *Doe v. N.Y. Univ.*, 666 F.2d 761, 765 (2d Cir. 1981).

[14] *Norcross v. Sneed*, 755 F.2d 113 (8th Cir. 1985).

[15] *Gardner v. Morris*, 752 F.2d 1271 (8th Cir. 1985).

[16] *Sisson v. Helms*, 751 F.2d 991 (9th Cir. 1985).

[17] *Treadwell v. Alexander*, 707 F.2d 473 (11th Cir. 1983).

[18] *Pushkin v. Regents of University of Colorado*, 658 F.2d 1372 (10th Cir. 1981).

[19] *Holly v. City of Naperville*, 603 F.Supp. 220, 229 (N.D. Ill. 1985).

[20] *Bento v. I.T.O. Corp. of R.I.*, 599 F.Supp. 731, 741 (D.R.I. 1984).

[21] *Guinn v. Bolger*, 598 F.Supp. 196 (D.D.C. 1984).

[22] *Fitzgerald v. Green Valley Area Educ. Agency*, 589 F.Supp. 1130, 1135-36 (S.D. Iowa 1984).

[23] *Longoria v. Harris*, 554 F.Supp. 102, 103 (S.D. Tex. 1982).

[24] *Vickers v. Veterans Admin.*, 549 F.Supp. 85, 86-87 (W.D. Wash. 1982).

[25] *Doherty v. Southern College of Optometry*, 659 F.Supp. 662 (W.D. Tenn. 1987).



vision in only one eye,[26] impaired hearing and use of hearing aids,[27] depressive neuroses,[28] congenital limb deficiency,[29] degenerative spinal condition,[30] chronic lower back syndrome with disc disease,[31] limited mobility of arm and shoulder,[32] osteoarthritis in hip,[33] artificial leg,[34] learning disabilities,[35] diabetes,[36] heart disease,[37] asthma,[38] absence of kidney,[39] hepatis B

[26] *Kampmeier v. Nyquist*, 553 F.2d 296 (2d Cir. 1977).

[27] *Strathie v. Dep't. of Transp.*, 547 F.Supp. 1367 (E.D. Pa. 1982).

[28] *Doe v. Region 13 Mental Health-Mental Retardation Comm'n*, 704 F.2d 1402 (5th Cir. 1983).

[29] *Wolff v. South Colonie Cent. School Dist.*, 534 F.Supp. 758 (N.D. N.Y. 1982).

[30] *Daubert v. United States Postal Service*, 733 F.2d 1367 (10th Cir. 1984).

[31] *Dancy v. Kline*, 639 F.Supp. 1076 (N.D. Ill. 1986).

[32] *Prewitt v. United States Postal Service*, 662 F.2d 292 (5th Cir. 1981).

[33] *Coley v. Secretary of Army*, 689 F.Supp. 519 (D. Md. 1987).

[34] *Ward v. Mass. Bay Transp. Auth.*, 550 F.Supp. 1310 (D. Mass. 1982).

[35] *Colin K. v. Schmidt*, 715 F.2d 1 (1st Cir. 1983).

[36] *Bentivegna v. United States Dep't of Labor*, 694 F.2d 619 (9th Cir. 1982).

[37] *Bailey v. Tisch*, 689 F.Supp. 652 (S.D. Ohio 1988).

[38] *Ackerman v. Western Elec. Co.*, 643 F.Supp. 836 (N.D. Cal. 1986).

[39] *Poole v. South Plainfield Bd. of Educ.*, 490 F.Supp. 948 (D.N.J. 1980).

carrier,[40] narcolepsy,[41] birth defects,[42] asbestosis,[43] and Crohn's disease.[44] [45]

It is easily seen that the Rehabilitation Act has a broad scope and applied to disabilities with various degrees of severity. There was little controversy about exactly what constituted a disability. These facts argue against the more restrictive view of disability advanced by Toyota.

Second, just as the construction of the Rehabilitation Act found a broad range of maladies to constitute disabilities, the Rehabilitation Act also recognized that it was not the particular malady or impairment that was the focus of the disability determination, but, instead, it was the effect of the impairment on the individual.

> The definitional task (of determining who is a handicapped person) cannot be accomplished merely through abstract lists and categories of impairments. The inquiry is, of necessity, an individualized one – whether the particular

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[40] *New York State Ass'n for Retarded Children v. Carey*, 612 F.2d 644 (2d Cir. 1979).

[41] *Ross v. Beaumont Hosp.*, 687 F.Supp. 1115 (E.D. Mich. 1988).

[42] *Bowen v. American Hosp. Ass'n*, 476 U.S. 610 (1986).

[43] *Fynes v. Weinberger*, 677 F.Supp. 315 (E.D. Pa. 1985).

[44] *Kling v. County of L.A.*, 633 F.2d 876 (9th Cir. 1980).

[45] The foregoing list was gathered from "The Americans With Disabilities Act after *Sutton v. United Air Lines* – Can It Live Up To Its Promise of Freedom for Disabled Americans?", 89 KLJ 539 (2001) and "Disability Discrimination in Employment Law," 137-140 (1995), Robert L. Burgdof.



> impairment constitutes for the particular person a significant barrier to employment.

*Forrisi v. Bowen*, 794 F.2d 931 (4th Cir. 1986), parenthetical statement added.

Third and most importantly, it was widely understood, and this Court so held, that the reasoning employed by the District Court in the instant case, the same reasoning which Toyota seeks to uphold, has been rejected under the Rehabilitation Act.

The District Court determined Ms. Williams was not disabled concerning manual tasks because her claimed limitations "are irretrievably contradicted by Plaintiff's continual insistence that she could perform the tasks in assembly and paint inspection without difficulty; positions requiring manual tasks." (Pet. App. 36a). Toyota agrees. (Pet. Brief, p. 7).

The flaw in this reasoning is that it ignores the fact that in order for an individual to be entitled to protection under the Rehabilitation Act or the ADA, that individual must be "otherwise qualified" or a "qualified individual," meaning that the employee must be able to do the work. Hence, it is wrong to exclude someone from ADA protection simply because they are able to work or they retain functional abilities as concerns the life activity in question.

The point is made in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979) which was this Court's first case dealing with the interpretation of the Rehabilitation Act of 1973.

In *Southeastern Community College v. Davis*, this Court noted that an individual must meet legitimate physical requirements in order to be an "otherwise qualified" individual. "An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." *Id.* at U.S. 406.

> [A] person who suffers from a limiting physical or mental impairment still may possess other abilities that permit him to meet the requirements of various programs. Thus, it is clear that Congress included among the class of "handicapped" persons covered by § 504 a range of individuals who could be "otherwise qualified." See S.Rep. No. 93-1297, pp. 38-39 (1974), U.S. Code Cong. & Admin. News p. 6373.

*Id.* at U.S. 405.

An individual is not excluded from protection against disability discrimination simply because they have the ability to work and function. In *Reynolds v. Brock*, 815 F.2d 571 (9th Cir. 1987), the District Court held that a clerk typist who suffered from epilepsy was not a handicapped person because she could perform the physical tasks of her job. The Ninth Circuit reversed,

> The District Court's approach would preclude any "otherwise qualified individual" from being classified as handicapped, because, under its analysis, anyone who could meet all of a job's requirements, and therefore was "otherwise qualified," would not be handicapped. Reynolds is "otherwise qualified." She may also be handicapped. A plaintiff need not prove that she is incapable of doing her job to prove that she is handicapped.

*Reynolds v. Brock, Id.* at 573.



When Toyota urges this Court to affirm the ruling of the District Court, Toyota requests this Court to adopt the flawed reasoning that Ms. Williams cannot be disabled as concerns manual activity because the record clearly shows she can perform some manual activity. The error is such reasoning leads to the conclusion that in order for Ms. Williams to be disabled, she must be incapable of performing manual activity, but that result would make the ADA meaningless because if disability means inability, then there will not be any "otherwise qualified individuals" to benefit from the Act.

## III.

## ALTERNATIVELY, THE CASE SHOULD BE REMANDED FOR A JURY TRIAL AS TO WHETHER MS. WILLIAMS IS DISABLED FOR PERFORMING MANUAL TASKS, LIFTING, WORKING, HAVING A RECORD OF DISABILITY, OR BEING REGARDED AS DISABLED.

If Ms. Williams is not entitled to judgment as a matter of law that she is disabled, then she is entitled to have the matter determined by a jury as she demanded and as the law requires.[46] The trial would address not only performing manual tasks but also working, lifting, having a record of disability, and being regarded as disabled.

The recent case of *Reeves v. Sanderson*, 530 U.S. 133 (2000)[47] is instructive and reaffirms the role of the jury in

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[46] 42 U.S.C. § 1981a(c).

[47] Although the case addressed the amount and kind of evidence necessary to sustain a jury verdict as per Rule 50, this

resolving factual conflicts and the varying inferences to be drawn therefrom. This Court noted that the whole record is to be reviewed, and "In doing so, however, the Court must draw all reasonable inferences in favor of the non-moving party, and it may not make credibility determinations or weigh the evidence." *Id.* at 150.

The only circumstance in which Ms. Williams would not be entitled to a jury trial is, "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.' " *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The same facts Ms. Williams relies on in support of her argument that she is entitled to judgment as a matter of law also support her entitlement to trial by jury.

Should the case be remanded for trial, it becomes necessary to address the Sixth Circuit precedent of *McKay v. Toyota Motor Mfg., U.S.A., Inc.*, 110 F.3d 369 (6th Cir. 1997) in which it was held as a matter of law that impairments similar to those of Ms. Williams did not give rise to an ADA disability for Ms. McKay because the impairments disqualified her "from only the narrow range of assembly line manufacturing jobs that require repetitive motion or frequent lifting of more than 10 pounds." *McKay, Id.* at 373.

Should this case be remanded for trial, this Court should make the following points:

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Court noted that summary judgment standard "mirrors" the Rule 50 standard. *Reeves v. Sanderson, Id.* at U.S. 150.



1. Whether Ms. Williams is disabled requires consideration of the "individualized inquiry" requirement of *Sutton v. United Air Lines, Inc., Id.* at U.S. 483, which means the real question always is "[W]hether the particular impairment constitutes for the particular person a significant barrier to employment." *Forrisi v. Bowen, Id.* at 933. Her limited education and vocational experience cause her impairments to have a greater impact on her than on an individual with more skills. Ms. McKay was 24 years old, had a college degree, and was earning a teaching certificate. *McKay, Id.* at 371.

2. *McKay* is factually incorrect because manufacturing jobs requiring repetitive manual activity and frequently lifting of more than 10 pounds are not a narrow range of jobs.

3. The "narrow range of jobs" analysis has no relevance to Ms. Williams' claim that she is substantially limited in the major life activity of performing manual tasks because the "narrow range of jobs" analysis only pertains to the major life activity of working, not to the major life activity of performing manual tasks. *See* 29 C.F.R. § 1630.2(j)(3)(i).

If this case is remanded without a discussion of *McKay*, then the likelihood of another District Court error is great.

## CONCLUSION

Ms. Williams respectfully requests this Court to affirm the Sixth Circuit decision that she is disabled as a

matter of law and remand the case to the District Court for further proceedings concerning whether Toyota discriminated against Ms. Williams by failing to reasonably accommodate her disability. The Sixth Circuit result should be affirmed even if an incorrect analysis was employed to reach a correct result.

Alternatively, this Court should review the summary judgment proceedings *de novo* and adjudge Ms. Williams to be ADA disabled as a matter of law because there are no disputed facts, and a correct analysis could not lead "a rational trier of fact"[48] to find she is not disabled.

Alternatively, the case should be remanded to the District Court for a jury trial not only on the issues of whether Ms. Williams is disabled as concerns the major life activities of performing manual tasks, of lifting, and of working, but also on the issues of whether she is disabled because she has a record of disability, § 12102(2)(B), or is regarded as being disabled, § 12102(2)(C).

Respectfully submitted,

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[48] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).